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Braxfield, Robert + Macqueen, Lord.

APRIL 5. 1770.

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INFORMATION ^{c#}

F O R

The Trustees of the Creditors of Messrs.
Adam and Thomas Fairholms, Bankers in
Edinburgh, Defenders;

A G A I N S T

Andrew Johnston of Rennyhill, and *Mrs. Anne Law*,
Merchant in *Edinburgh*, Pursuers.

MESSRS. *Adam and Thomas Fairholms*, bankers in *Edinburgh*, had carried on trade to a very great extent: But *Adam Fairholm* having resided for some time at *London*, and having been deeply concerned in the stocks, in which at last he had been very unlucky, was obliged to stop payment in *March 1764*.

Notice of *Adam's* stopping payment at *London* was given to *Thomas* in *Edinburgh*, by a letter from *George*, another brother, who resided at *London*, sent by express. *Thomas*, believing that he could not carry on the business of the house in *Edinburgh*, after *Adam's* stopping payment, who had got into his hands a large part of the company's funds, did immediately come to the resolution of likewise stopping payment: And, that justice might be done to the creditors of the company, in the most equal manner, and at the least expence, he did, by advice of the ablest council, execute a disposition, whereby he and his brother do convey to *Francis Farquharson*, *Thomas Boswell*, and *Ludovick Grant*, writers in *Edinburgh*, or the accepters or acceptor, or survivors or survivor of them, in trust, for behoof of their creditors, all their estate, heritable or moveable

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moveable, with a *proviso*, that Mr. *Farquharson* should have power to execute the trust, without consent of Mr. *Boswell* or Mr. *Grant*; and, in the event of *Francis Farquharson's* non-acceptance, or death, that Mr. *Boswell* should have power to execute the trust, without the consent of Mr. *Grant*.

It is further provided, that if the major part interest of the creditors should think fit to chuse other trustees, the trustees named in the disposition should be bound to denude in their favours; and the trustees named, or to be named, are empowered to sell and dispose of the estate, and to divide the proceeds from time to time among the creditors equally, in proportion to their debts, without prejudice to any preferable right or diligence, if any shall be in, or done by any of the said creditors, prior to the completion of this present right.

A meeting of the creditors was called upon the 26th of *March*, when a good many attended, and the doers for many others.

The meeting made choice of Mr. *John Mackenzie* to be preses; and from the minute subscribed by him, at the desire of the meeting, it appears, that the meeting was informed of the trust-disposition; and that although they then did not directly approve of the disposition, not having had time to determine themselves, yet that they, in general, approved of the measure that was taken, of conveying all to a trustee, as the most prudent method of doing justice to the creditors; and, after recommending to *Thomas Fairholm* to make an inventory of the company's books, and to lodge it with Mr. *Farquharson*, they named *John Mackenzie*, *Samuel Mitchelson*, *Alexander Stewart*, *John Davidson*, *Thomas Tod*, *John* and *James Pringles*, or any three of them, as a committee, to meet with the trustee, and with whom the trustee might confer on all necessary occasions; and they appointed the next meeting of the creditors, to be on the 2d of *April*, at 11 o'clock, and ordered an advertisement, to that effect, to be put in the news-papers. In the mean-time, the trust-disposition was printed, and a great number of copies thrown off, to be dispersed in the next meeting, which was done accordingly.

The meeting was held upon the 2d of *April*, in the session-house, and was exceedingly numerous; and having made choice of Mr. *John Mackenzie* to be preses, and the federunt of the 26th *March*, and a deed of accession and submission relative thereto, to be signed by the creditors, having been all read over in the audience

audience of the meeting, the creditors were asked, whether they chose to name any other trustee or trustees, in place of those named by the trust-deed; and whether they inclined to accede to the measure, as proposed in the trust-deed, and deed of accession. Upon which, the meeting, without a contradictory voice, declared their willingness to agree to the measures proposed, and to sign the deed of accession: And the trustees, who were all three present, having been asked to accept, they agreed: And thereafter, the meeting came to the following resolutions:

1^{mo}, They recommend to the trustees, to appoint *Thomas Fairholm* to be their factor, upon his finding caution, to the amount of 1000 *l*.

2^{do}, That all the books, and grounds of debt, remain in Mr. *Fairholm's* hands.

3th, That he immediately make up inventories thereof, and states of the debts and funds of the company, and lodge the same with the trustees.

4th, That when any sum of money, exceeding 300 *l. Sterling*, shall be received, the same be forthwith lodged with the bank of *Scotland*, or the royal bank, or a half with each, upon such rate of interest, as the banks and trustees shall agree for.

5th, That the creditors be advertised to lodge their claims, and vouchers thereof, in the hand of such person as the trustee shall appoint, at least, to produce the same to him, that copies or notes thereof may be taken, and ingrossed in a book to be kept by the trustees; and the principals, after being marked by one or other of them, are to be returned to the party.

6th, That all interest upon the debts resting by the company shall stop, as upon the 26th day of *March*, the date of the trust-disposition; and all open accompts, when adjusted, to be stated as they stand at that day, which is to be considered as the period of the total amount of the company's debts, so as all may be on the same footing.

7^{mo}, That the claim on the part of the Crown, said to be for 1000 *l*. or thereby, of his Majesty's excise, lodged with the company by Collector *Hope*, be laid before Mr. *James Ferguson* of *Pitfour*, by whose opinion the creditors agreed to be determined, how far the Crown is preferable upon a writ of extent, yea or not.

The deed of accession and submission, was likewise signed by most of the creditors present.

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After the trust-right had apparently been acquiesced in by the creditors for several months, and the trustees had recovered, and lodged a considerable sum of money in the bank of *Scotland*, in pursuance of the foresaid resolution of the creditors, of the 2d of *April*, Dr. *Heriot*, in the view of operating full payment, wanted to appropriate to himself what had been lodged in the bank, as the money of the whole creditors; and, in that view, he, in the month of *December* 1764, used arrestments in the hands of the trustees, and of the bank of *Scotland*; but it was found, after a long litigation, that he was to be held as an acceding creditor, and was therefore barred from operating his payment by separate measures.

Andrew Johnston of *Rennyhill*, a creditor for 222 *l.* and Mrs. *Anne Law*, merchant in *Edinburgh*, a creditor for 394 *l.* followed Dr. *Heriot*'s example; and, in the months of *December* 1764 and *January* 1765, used arrestments against the bank, for attaching the money that had been deposited there, for behoof of the whole creditors, and afterwards refused to take their just proportion of that money, when the same came to be divided among the creditors; and they brought an action before your Lordships, for setting aside the foresaid trust-disposition, as being made contrary to the enactment of the statute 1696: And multiple-poidings having likewise been brought in name of the bank, the whole came to be insisted in before the Lord *Gardenstoun* Ordinary, who, of this date, pronounced the following interlocutor: "Sustains
July 19. 1769. " the reasons of reduction of the trust-disposition libelled, so far
" as the pursuers have an interest therein, and reduces, decerns,
" and declares accordingly; and appoints parties procurators to
" be ready to debate on the effect of the arrestments founded on
" by the pursuer, against next calling." And to this interlocutor his Lordship adhered.

The defenders reclaimed against these interlocutors of the Lord Ordinary; and when the petition and answers came to be advised, it occurred to your Lordships, that even although it should be found, that the foresaid trust-disposition was reducible, to the effect of intitling the creditors to attach the subjects of the bankrupt by legal diligence, that yet it was a separate question, what effect ought to be given to the foresaid arrestments in this case; because it merited a different consideration, how far, after the trust-right had received execution, and the subjects of the bankrupt

rupt had, in consequence thereof, been ingathered, and converted into cash for behoof of the creditors, it was thereafter competent for any of the creditors, to attach the money from thence arising, either in the hands of the trustees, or in the hands of any other person or persons with whom it might be deposited for the creditors behoof: And as this question was still entire before the Lord Ordinary, so, in order that the whole cause might receive the judgment of the court at once, your Lordships, of this date, Feb. 21. 1770. pronounced the following interlocutor: "The Lords having heard this petition, with the answers thereto, they, before answer, remit to the Lord Ordinary to call and hear parties procurators upon the other points in the cause." And thereafter, at a calling of the cause, of this date, the Lord Ordinary made March 1. 1770. *avisandum* to your Lordships with the question concerning the effect and validity of the arrestments used by *Johnston* and *Law*, and appointed parties procurators to state that question in informations: And, in obedience thereto, this is humbly offered on behalf of the defenders.

As the general question, viz. How far a disposition granted by a bankrupt to trustees, for behoof of his whole creditors, is reducible at the instance of non-acceding creditors? is very fully stated in the petition for the defenders, they will not trouble your Lordships, with adding a single word to what is there said upon that point, but will confine their argument entirely to the other question, viz. What effect, in this case, is to be given to the arrestments which have been used by the pursuers?

If your Lordships shall be of opinion for the defenders, upon the general point, that there is no good ground in law for setting aside the trust-disposition, in this case; it must follow, of necessary consequence, that the arrestments can have no effect, but the pursuers must take their share, along with the other creditors, out of the funds collected under the trust-right.

But even supposing that your Lordships should be of a contrary opinion, and that the disposition in question is not sufficient to bar the creditors from attaching the estate and effects of the bankrupt by legal diligence, yet they humbly hope your Lordships will, notwithstanding, be of opinion, that the arrestments which have been used by the pursuers in this case, can have no effect; and that they cannot, in virtue thereof, pretend

to draw more than a rateable proportion of the money, *in medio*, along with the other creditors.

It must occur to your Lordships, that where any person becomes bankrupt, and so, unable to satisfy his creditors to the full amount of his debts, that it is founded in the strongest justice and equity, that creditors, who are all equally onerous, should all be preferred, *pari passu*, upon the effects of their debtor. It is a hard case, that the accidental circumstance of a few creditors being upon the spot of their debtor's residence, should put it in their power to carry off the bulk or whole of their debtor's funds, and that other creditors, living at a distance, should be totally disappointed of drawing any part of their payment. As the *pari passu* preference of creditors is strongly founded in material justice and equity, so it is likewise agreeable to the genius of the law of Scotland. For this purpose it was, that the *pari passu* preference of apprizers was established by the statute 1661; and although that statute did only extend to the heritable estate of the debtor, as indeed moveable or personal funds were, at that period, of very little value, and therefore, not much meriting the attention of the legislature; yet, even as to these, it has not been totally overlooked, but was so far provided for by the act of sederunt 1662. Indeed, the very statute 1696, upon which the present-reduction is founded, was in a great measure calculated to preserve an equality among creditors, and to prevent a partial gratification of one or more creditors, in prejudice of the rest; and therefore, although your Lordships should be of opinion, that a trust-disposition, granted by a bankrupt, would not intitle the trustee to compete with creditors, who have affected the estate of the bankrupt by diligence, the defenders are humbly persuaded, that when equity leans so strongly in favours of deeds calculated to do equal justice to all the creditors, your Lordships will not be disposed to extend the law to cases that do not clearly fall under the purview and intendment of it.

Your Lordships will observe, that no just exception can be taken to the terms of the trust-deed. It was laid before the creditors in a very numerous meeting, called, in consequence of public advertisements, for concerting measures for carrying the trust-right into execution, in the manner that should appear to be the most effectual, and the least expensive; and at the meeting, joint measures were agreed to, without a contradictory voice: Nor have the pursuers,

purfuers pretended to alledge (what indeed could not have gained credit) that they were ignorant of the trust-right, and of the joint measures that had been agreed to by the bulk of the creditors, in consequence of it.

And therefore, whatever effect might have been given to the purfuers diligence, if they had dissented from the common measures that had been concerted and agreed to by the bulk of the creditors, and had proceeded to attach the funds of their debtor by adjudication, poinding, or arrestment, in order to prevent the trustees from recovering the funds for behoof of the creditors, in virtue of the disposition in their favours; yet, when the purfuers did ly by for the space of ten months, without giving the smallest hint that they were dissatisfied with the trust-right, and the measures that were agreed to by the creditors, or that they did not mean to acquiesce and draw their payment accordingly, but, on the contrary, were silent for the space of ten months, and in a manner connived at the execution of the trust-right, until the trustees, in consequence thereof, have made effectual the funds of the debtor, and converted the same into money, to pave the way for a division among the creditors, the defenders do, with submission, contend, that the dissenting creditor cannot avail himself, or procure a preference to the other creditors, who fairly offer him a share of the funds recovered, by arresting these funds, either in the hands of the trustee, or of any other person in whose hands the money might be deposited, for behoof of the whole creditors.

If such an arrestment should be found good, and preferable, it is in effect to give the dissenting creditor the sole benefit of the disposition and trust, which was granted for behoof of all the creditors. The dissenting creditor, with submission, cannot, with justice or congruity, contest the trustee's right to recover those sums for behoof of the creditors, and yet take the benefit of his acting as trustee, in exclusion of the other creditors, for whose behoof he acted. This, with submission, would be manifest injustice and iniquity, which your Lordships will never tolerate.

Though a man in bankrupt circumstances, can do no partial or unjust deed to hurt and defraud his creditors, yet his bankruptcy does not denude him of his property, or bar him from exercising proprietary powers over it. Thus it is, that a bankrupt, not interpellated by diligence, can sell and dispose of his subjects

jects to a fair purchaser, at a just and adequate price. His onerous creditors, whose debts were contracted even after his bankruptcy, are entitled to attach his funds for their payment, as well as those creditors whose debts are contracted before it. And therefore, although it should be held to be law, that a disposition granted by a bankrupt to a trustee, for behoof of his whole creditors, would not entitle the trustee to compete with dissenting creditors, affecting the estate of the bankrupt by legal diligence; yet it can by no means be considered as a null and ineffectual deed: On the contrary, as the property remained with the bankrupt, so the disposition must be available to transfer that property in favours of his disponee; and it will undoubtedly give a lawful title to the trustee, to pursue for, and apprehend the effects of the bankrupt.

If a trustee should, in virtue of such a disposition, bring an action against the debtors of the bankrupt, for the recovery of such debts or effects, it certainly would not be competent to the debtors to object the want of title in the trustees. Your Lordships would certainly repel such objection, and compel the debtors to make payment to the trustees, for behoof of the whole creditors. A trust-disposition of this kind is undoubtedly a valid and an effectual deed, under which the trustees can lawfully sue and recover the effects of the bankrupt; and the possession attained, in consequence of such trust-right, would not in law be held either as a predonious or unlawful possession.

It has always been understood, that actual payments by a bankrupt, though even made to a particular creditor, is not liable to challenge at the instance of other creditors, and that they are not founded in an action of repetition against him, if no fraud can be alledged against the creditor who receives the payment. And therefore, although it was no doubt competent to any of Messrs. *Fairholms* creditors, to attach any of their funds by legal diligence; yet supposing that the creditors did ly by, and allow the bankrupts themselves to uplift and ingather the funds, and convert the whole into money, and that they should have divided the same among the creditors, it is a clear case, that such payments would have been held to have been fairly and *bona fide* made, and they could not have been challenged by any of the creditors. Now, the defenders, with submission, cannot discover any solid difference or distinction, whether the funds should be recovered,

recovered, and the money from thence arising should be divided by the bankrupt himself, or if the same should be done by a factor, or a trustee, appointed by him for that very purpose; and therefore, however competent it might have been to any of the creditors, notwithstanding of the trust-disposition, to have attached the estate and effects of their debtor by legal diligence; yet if they should ly by, and allow such factor or trustee to ingather the effects, convert the same into money, and divide the same among the creditors, the defenders will be allowed to hold it as a clear case, that such payments would be effectual, and that it would not be competent for any dissenting creditor, refusing to receive his payment, to challenge the payments made to the other creditors, and, by arresting in their hands, oblige them to make the money forthcoming to the arrester, in satisfaction of his debt. The defenders do, with submission, apprehend, that, to such a plea, it would have been a most sufficient answer, that however competent it might have been to such a creditor, to prevent the trustee from executing the trust, by attaching by diligence the subjects while they were *in medio*; yet if they have lain by, and allowed the trustee to execute the trust, to ingather the funds, convert them into money, and pay the same to the creditors, the creditors were, *in optima fide*, to receive such payments, and must therefore be entitled to hold the money they received, in satisfaction of their debts.

And if this would hold, if the creditors had, *de facto*, received payment of their respective shares of the money now in question, they, with submission, can see no good reason why a different judgment ought to be given in this case. Your Lordships will observe, that these pursuers do not pretend to dissent from the common measures, or to disapprove of the trust-right in any respect, until the trustee had so far executed the trust, by disposing of part of the funds, converting the same into money, and lodging the same in the bank, until the creditors should be ready to receive it. It was in consequence of a resolution of the creditors, at their meeting of the 2d of *April*, that the money now arrested was so lodged; and if the arrestments would have been unavailable in the hands of the creditors themselves, if they had received actual payment; so, the defenders do, with submission, apprehend, that it can make no difference, whether the money was actually paid to the creditors, or if it was, by their

order and appointment, lodged in the hands of any person, for their behoof. The money so lodged in the bank, by the express order and appointment of the creditors, falls truly to be considered as the money of the creditors: They had each of them a right to the money so deposited, in proportion to their respective debts: And if the creditors would each of them have been entitled to retain his share of the money secure against the diligence of any dissenting creditor, if the same had been actually paid to them, the defenders apprehend, that, by the same rule, the money lodged in the bank, by their appointment, and for their behoof, must be equally secure against the diligence of such dissenting creditors.

This question was accordingly determined in favours of the defenders, in the case, *Souper contra the creditors of Smith*, 23d January 1756: The case there was, *Alexander Smith* being insolvent, did, at a meeting of his creditors, write the following letter, directed to *John Watson*, "I hereby empower you, to cause roup and sell the furniture of my house, and liquors in my cellars, for the behoof of my creditors."—In consequence of this letter, *Watson* roup'd part of the goods: *Souper*, a creditor of *Smith's*, who had not been present at the meeting, arrested in the hands of *Watson*; which brought on a competition betwixt him and the other creditors. The Lords found, "That the goods sold, and the prices thereof received by *Watson*, belonged proportionally to the creditors, according to their debts." And the defenders are informed, that a similar judgment was given a few years ago, in a case not yet collected, and which was not so strong as the present, viz. *Mackell contra Maclamruck*, where the trustees were preferred to a creditor who had arrested in the hands of the person who purchased from the trustees the stocking of a farm, which the bankrupt had conveyed to these trustees for the behoof of his creditors.

A case determined by the court in the 1764, betwixt *Strachan* and *Moodie*, was mentioned as a precedent for the pursuers: But the defenders apprehend, that it is totally different from the present: For, in that case, the creditor who sued for reduction was in the course of diligence when the trust-disposition was executed: She had used inhibition, raised and executed a horning upon the 31st May and 5th June, and used arrestments on the 7th June, and the trust-disposition was not executed till the 14th June.

June. A partial preference was directly given to two creditors in the disposition, which was of itself sufficient to set it aside: And the trustees having immediately converted the estate into cash, in a manner abundantly irregular, the creditor who sued for reduction proceeded in her course of diligence, and used arrestments against the trustees, and others, upon the 18th, 23d, 24th, 29th, and 30th days of the same month of *June*.—These facts and circumstances difference that case so much from the present, that it cannot, in any view, be held as a precedent against the defenders.

And therefore, upon the whole, however the pursuers might have been intitled to have attached the proper estate and funds of the debtor, while they were *in medio*, and might, in virtue of their diligence, have claimed a preference to the trustees claiming under the disposition granted by the common debtors; yet, as the pursuers did ly by for the space of ten months, without insinuating a dissent or disapprobation of the common measures that had been concerted by the other creditors, and allowed the trustees, in pursuance of that concert, to execute the trust, by ingathering the funds, converting them into cash, and lodging the same, in consequence of the order and appointment of the creditors, to be lodged in the banks for their behoof; it is humbly contended, that the money so lodged for behoof of the whole creditors, cannot be attached by the pursuer's arrestments. They cannot contest the trustees right to recover those sums for behoof of the creditors, and yet take the benefit of the defender's acting as trustee, in exclusion of the other creditors, for whose behoof they acted. That actual payment made to the creditors, would actually have secured them against the pursuers diligence, cannot be disputed. They could not have been obliged to refund payments, which they had honestly and *optima fide* recovered; and the defenders cannot conceive that case to be materially different from the present.

It may farther be observed, that the arrestments, in this case, are inept and insufficient for attaching the shares of the acceding creditors. Neither the trustees, nor the bank, are debtors to the bankrupts, but to the creditors, *quoad* the extent of the share of those creditors who have acceded.

It is a settled point, that an arrestment, used not against a debtor to the common debtor, but against the debtor's factor, is
inept;

inept; and it has likewise been adjudged, that an arrestment used against the trustees of the debtor to the common debtor, is inept. — 12th December 1752, *Campbell contra Faichney*; 9th February 1759, *Stalker contra Aiton*.

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If the money recovered had been retained by the trustees, an arrestment used against them by the pursuers was inept, agreeable to those decisions; because they would not have been debtors to the common debtor, the bankrupts, but to their creditors; and the case is not altered, by the money being deposited in the banks, because the banks are the depositars, either of the trustees or the creditors, and not of the bankrupts; and, consequently, cannot depone in the furthcoming, that they owe the sums deposited, to the Messrs. *Fairholms*.

In respect whereof, &c.

R.O. MACQUEEN.

